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IN THE

Supreme Court of the United States

October Term, 1966

No. 1136

AERO MAYFLOWER TRANSIT CO., INC.,
Appellant,

v.

UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

On Appeal From The United States District Court
For The Southern District of Indiana

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c) of the Rules of this Court, appellees, Alaska Orient Van Service, North American Van Lines, Inc. and Smyth Overseas Van Lines, Inc., move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission. The Commission's order denied appellant's application for a certificate of public convenience and necessity authorizing operations as a common carrier by motor vehicle between points in Alaska under the Alaska "grandfather" statute. 74 Stat. 382; 49 U.S.C. §306(a)(4) and §306(a)(5). This application was heard by an examiner of the Commission, reviewed by Division 1 of the Interstate Commerce Commission (which affirmed the Examiner's Recommended Report and Order); the Commission's decision was reaffirmed unanimously by the members of the three-judge court for the Southern District of Indiana; appellant's motion for rehearing before the three-judge court was denied and the subject appeal is the latest effort of appellant in this drawn out litigation.

ARGUMENT

The decision below should be affirmed without plenary review by this Court for the following reasons:

1. This is not a matter of first impression. This Court affirmed the Interstate Commerce Commission's denial of an identical application in *Andrews Van Lines, Inc. v. United States* (D. Nebr. 1965), aff'd. mem., 382 U.S. 67 (1965). A three-judge court for the Eastern District of Missouri similarly affirmed the Commission's denial of an identical application in *United States Van Lines, Inc. v. United States*, 249 F.Supp. 984 (E.D. Mo. 1965). Appellant

has not shown that these decisions on applications for Alaska operating rights, identical with its own, are inapplicable to it and this fact alone constitutes a basis for affirmance.

2. Since appellant recognizes that only one carrier may be given operating authority on the basis of a single set of operations, citing *United States v. Rosenblum Truck Lines, Inc.*, 315 U.S. 50 (Appellant's Brief, p. 12), the essence of this appeal is that the Commission erred in granting operating authority to Alaska Van & Storage, Inc., the carrier located in Alaska which performed the actual motor transportation of the shipments involved, and that this authority should have instead been granted to appellant, Aero Mayflower Transit, Inc. At the threshold, we submit that appellant cannot use this suit as a means of collaterally attacking a decision of the Commission in *Alaska Van & Storage Co., Inc. - "Grandfather" Application*, 94 M.C.C. 381 (1964). *Callanan Road Co. v. United States*, 345 U.S. 507, 512-13; *Yakus v. United States*, 321 U.S. 414, 429-430.

3. Going beyond this point, appellant bases its appeal upon the claim that the Commission's findings are not supported by substantial evidence, and more specifically, the finding that: "All matters pertaining to the operation of the vehicles, and the direction and control of such operation were, on the statutory date, and still are, under the exclusive domination and control of the Alaska-based carrier." (Appellant's Brief, p. 19).

The evidence before the Commission, however, clearly supports the Commission's finding.

Appellant's own witnesses testified that Alaska Van and Storage Company, not appellant, hired and fired drivers in Alaska, paid their salaries, and gave

them directions (Tr. 697, 701); that the trucks in Alaska were registered in the name of Alaska Van and Storage, not Aero Mayflower, and Alaska Van and Storage paid the public liability insurance (Tr. 697-698); that Alaska Van and Storage, not appellant, determined the schedule of loading and unloading, and controlled the entire physical operation in Alaska (Tr. 698-700); and that Aero Mayflower did not concern itself with the Alaska operations, but merely paid a straight fee for the services performed by Alaska Van and Storage Company for it in Alaska. (Tr. 701).

Moreover, the record shows that appellant owns no equipment in Alaska and maintained no supervisory personnel or employees of its own in Alaska (Tr. 725, 729), admitted that inspection and control over motor vehicles in Alaska was exercised by Alaska Van and Storage Company, which owned them (Tr. 730-732, 752), and knew of no employees or facilities of Alaska Van and Storage Company that were ever submitted for approval by appellant since 1957. (Tr. 754-755).

The record is devoid of any evidence that the drivers of the trucks supposedly leased to appellant ever submitted logs, safety reports or medical examination reports to Aero Mayflower, that appellant had any motor vehicle equipment reserved for its exclusive use under the alleged lease on and after August 26, 1958 [the critical date], or that Aero Mayflower ever held a license to do business in the State of Alaska. Accordingly, viewing the evidence before it under the applicable law, the Commission quite properly concluded that the alleged lease was not effective as a *bona fide* lease arrangement since appellant did not *in fact* exercise direction and control of motor vehicle operations performed in Alaska by its purported agent so as to make the Alaska operation its own, and was not therefore a common carrier by

motor vehicle between points in Alaska on and after August 26, 1958, entitled to a grandfather certificate.

The Commission's holding is therefore fully supported by substantial evidence of record.

4. Apparently recognizing the difficulty in supporting its claim that the Commission's decision is unsupported by substantial evidence, appellant attempts to prop up its appeal with an argument that the Commission employed an erroneous legal standard, more specifically, that the "physical control test" is not determinative of which carrier is entitled to the motor carrier operating certificate. In its briefs and oral hearing before the three-judge court, appellant argued that the motor carrier operations in Alaska physically performed by Alaska Van & Storage were in fact under the direction and control of appellant, Aero Mayflower. At no point, did appellant argue before the Commission or in the court below, *as it does here for the first time*, that the Commission acted erroneously in applying the physical control standard. This argument is therefore entitled to no consideration by this Court. *United States v. Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952); *United States v. Capital Transit Co.*, 338 U.S. 286, 291 (1949). Furthermore, appellant recognizes that in order to come within the purview of *Thompson v. United States*, 321 U.S. 19 (1944), which appellant relies upon in making this new argument, Aero Mayflower would have had to perform a single coordinated transportation service, including the portion in Alaska. (Appellant's Brief, p. 16). As we have shown, *supra*, the schedule of dispatch, loading and unloading and direction of the transportation in Alaska was solely in the control of Alaska Van and Storage — and this is what the Commission properly found.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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